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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(El Dorado)

RICHARD GARDNER et al.,

Plaintiffs and Appellants,

v.

JOYE L. McCOY et al.,

Defendants and Appellants.

C067564

(Super. Ct. No. SC20080098)

For nearly 20 years, plaintiffs Richard and Nancy Gardner leased certain property in South Lake Tahoe from Willette Strong, who held the property as the trustee of a testamentary trust set up by her late husband, Lester, for her support and maintenance.¹ Under the terms of Lester's will, the trust was to terminate on Willette's death and the trust property was to pass to his two daughters, defendants Joye McCoy and Carmen McCandlish (jointly, defendants). Along with the lease, however, Willette granted the

¹ To avoid confusion, we will refer to Lester and Willette Strong by their first names.

Gardners the option to purchase the property on her death. When she died in 2007, they attempted to exercise the option, but defendants refused to cooperate. This breach of contract action followed.

Both sides moved for summary adjudication. Determining that the option was valid, the trial court granted the Gardners' motion and denied defendants' motion. Thereafter, the court awarded damages to the Gardners, entered judgment in their favor, and awarded them attorney fees and costs.

On appeal from the judgment and the award of attorney fees, defendants contend (among other things) that the trial court erred in ruling on the motions for summary adjudication because Willette was a life tenant who had no right to grant an option to purchase trust property that was effective only when she died. On their cross-appeal from the judgment and their appeal from a postjudgment order taxing their costs, the Gardners contend the trial court erred in awarding them a lesser amount of damages than they were entitled to and in taxing a substantial part of the costs they claimed.

We conclude the trial court did not err in granting the Gardners' motion for summary adjudication or err in denying defendants' motion for summary adjudication because Willette was *not* a life tenant; she held the property as a trustee under a trust that would have allowed her to sell the property outright during her lifetime and thus permitted her to take the lesser step of granting an option to purchase the property. We also conclude, however, that the trial court erred in its award of damages to the Gardners, and therefore we will reverse that award and remand the case to the trial court to recalculate it, though we otherwise affirm the judgment. As for the postjudgment orders granting the Gardners' motion for attorney fees and taxing some of the Gardners' costs, we will affirm those orders.

FACTUAL AND PROCEDURAL BACKGROUND²

Lester died in 1977. Pursuant to his will, he left all of his property to his wife, Willette, in trust, for her lifetime. Upon her death, the trust was to cease and, after the payment of certain specific bequests, the remainder of the property was to pass to Lester's daughters, defendants. (Willette was not defendants' mother.)

Among the trust property was certain real property on U.S. 50 in South Lake Tahoe known as the Red Hut property.

In June 1978, Willette leased the Red Hut property to Malcolm and Lorraine Grant pursuant to a written lease. The term of the lease was five years, with an option to renew for an additional five years.

In November 1981, Willette and the Grants entered into an addendum to the lease under which, in exchange for \$100, Willette gave the Grants an option to purchase the Red Hut property. By its terms, the purchase option could be exercised only in the event of Willette's death during the term of the lease or during the term of the five-year renewal of the lease. The purchase price was to be the appraised value of the property at the time of the exercise of the option. If the parties could not agree on the appraised value, then either party could petition the El Dorado Superior Court to select an appraiser, whose decision on the value would be conclusive. The terms of purchase were 25 percent cash down, with the balance payable over 10 years, with interest at the prime rate, secured by a deed of trust on the property. The addendum further provided that if legal action was necessary to enforce the terms of the option agreement, the prevailing party could recover reasonable attorney fees and costs of suit.

² The following facts are drawn from the allegations of the verified complaint, as admitted in the verified answer, and from the undisputed facts shown in connection with the cross-motions for summary judgment/summary adjudication.

In December 1982, the Grants exercised their option to renew the lease through May 1988.

In December 1984, with Willette's consent, the Grants assigned their interest in the lease and the lease addendum to The Hut Partnership -- a general partnership consisting of Jerry Slack and Richard Gardner. Willette also agreed to extend the terms of the lease and the lease addendum through May 1993.

In August 1988, with Willette's consent, Slack assigned his interest in the lease, the lease addendum, and the lease extension to the Gardners.

In December 1997, Willette and the Gardners entered into a second addendum to the lease, under which the terms of the lease, the original lease addendum, and the lease extension were extended through May 2003. The second addendum also gave the Gardners the option to further extend the lease through May 2008. The Gardners subsequently exercised that option.

In October 2006, James Riordan was appointed to serve as trustee of the trust. By the spring of 2007, the trust had insufficient cash to pay its obligations. As a result, Riordan sought court approval to sell the Red Hut property to the Gardners. An appraiser determined that as of the end of May 2007 the property was worth \$460,000.

In July 2007, before court approval of the sale to the Gardners, Willette died. In September 2007, the Red Hut property passed to defendants in equal shares. Thereafter, the Gardners attempted to exercise their option to purchase the property based on the previously appraised value of \$460,000 by depositing \$115,000 in cash and a promissory note for \$345,000 into escrow with a title company. Defendants, however, refused to recognize the Gardners' exercise of the purchase option. Accordingly, in April 2008, the Gardners commenced this action by filing a verified complaint for breach of contract and breach of the covenant of good faith and fair dealing against defendants, seeking damages and specific performance.

In October 2008, defendants moved for summary judgment or summary adjudication on the ground (among others) that Willette did not have the power to grant the purchase option because “under the terms of the Trust, Willette . . . possessed only a life estate in the Red Hut property.” Defendants also argued that the appraisal on which the Gardners were relying for the purchase price understated the size of the property. In support of their motion, defendants set forth as undisputed facts most of the chronology set forth above, relying largely on the documents attached to the Gardners’ complaint.

In opposition to the motion, the Gardners argued that even though she was only a beneficiary of the trust for her lifetime, Willette nonetheless had the power to dispose of the Red Hut property by granting a purchase option that was effective only on her death. The Gardners also challenged defendants’ attack on the appraisal.

In December 2008, before the trial court ruled on defendants’ motion, the Gardners filed their own motion in which they sought “an order granting summary adjudication on their First Cause of Action for Breach of Contract, granting them the right to purchase the Red Hut Property and awarding them their attorney’s fees and costs.” To establish the undisputed facts in support of their motion, the Gardners relied primarily on the exhibits to their own complaint and on the evidence defendants had submitted in support of *their* motion; however, the Gardners did not actually submit any of these exhibits or evidence to the court along with their motion. Instead, they simply cited the exhibits and evidence in their separate statement.

In opposing the Gardners’ motion for summary adjudication, defendants did not object to the evidentiary basis for the motion or argue that the summary adjudication the Gardners had requested was procedurally inappropriate. Instead, they disputed some of the facts the Gardners asserted and argued on the merits that the Gardners did not have a

valid option to purchase the Red Hut property because Willette “had no authority to sell, or grant an option to sell, the . . . [p]roperty.”³

The cross-motions came before the court for hearing in March 2009. After oral argument from both sides, the court requested additional briefing.

Then, in June 2009, the court issued its ruling on the cross-motions without holding a further hearing. The court concluded that the case “turn[ed] on the legal effect of the various documents.” Construing those documents, the court determined that Lester’s will gave the Red Hut property to Willette, in trust, “with the specific power ‘to receive, hold, sell, exchange, mortgage, manage, invest and reinvest the principal and proceeds therefrom.’ ” In essence, the court concluded the Gardners’ option to purchase the property was valid and they had properly exercised the option. Accordingly, the court granted the Gardners’ motion and denied defendants’ motion. In granting the Gardners’ motion, the court further determined that they were entitled to an award of attorney fees and costs.

Two weeks later, the Gardners filed a memorandum of costs, along with supporting documentation, claiming over \$38,000 in attorney fees. Defendants moved to strike the costs memorandum, arguing that a noticed motion for attorney fees was necessary and that, in any event, any fee award was premature because the Gardners’ second cause of action, for breach of the covenant of good faith and fair dealing, remained unresolved. The Gardners responded by filing a motion for attorney fees and costs. The trial court denied the motion to strike the costs memorandum but also denied the motion for attorney fees on the ground that fees could not be fixed until judgment was rendered.

³ They also argued that the option had expired by the time the Gardners purported to exercise it, but they have abandoned that argument on appeal.

In a settlement conference statement filed in November 2009, the Gardners contended that the issues remaining to be resolved were their “breach of contract damages and [their] cause of action for breach of the covenant of good faith and fair dealing.”

In December 2009, the Gardners procured another appraisal of the Red Hut property, which valued the property at \$470,000 as of July 26, 2007 (hereafter, the JPA appraisal).

Ultimately, the matter was set for trial in August 2010. In their pretrial brief, the Gardners claimed as damages the rent they had been paying on the property since October 2007, when they attempted to exercise the purchase option. For their part, in their brief defendants argued (among other things) that enforcement of the option would violate the Subdivision Map Act (Gov. Code, § 66410 et seq.) because the purchase option covered only part of the legal parcel. Along with their brief, defendants filed the JPA appraisal, which they contended, unlike the appraisal from 2007, “covered the entire legal parcel.” More broadly, defendants asserted in their brief that there were “no triable issues remaining to proceed to trial, and therefore the Court should resolve [the] various questions of law presented in the instant briefing and enter judgment at the conclusion of this pretrial briefing.”

At a status conference in early August, the trial court vacated the “one day court trial date” set for later that month and set a hearing on motions in limine for September, with a case management conference to reset the trial date scheduled for October.

Thereafter, the parties filed and briefed various in limine motions. The court continued the hearing on those motions to October and at that hearing asked the parties, “What makes the most sense is proceeding with this matter?” Consistent with their pretrial brief, defendants’ attorney asserted that a trial might not be necessary because “a decision with regard to the issues raised in . . . the pretrial briefs . . . are [*sic*] largely dispositive.” Later, defense counsel reiterated that the various issues in dispute were “all

. . . legal issues that your Honor can and should decide.” Ultimately, the court decided it wanted briefing on “the issue of what property should be included in the order” before addressing any other issues. A hearing on that issue was set for December.

At the hearing in December, the court informed the parties that it had issued a formal ruling the day before. In that ruling, the court addressed not only what property was subject to the purchase option, but also the amount of damages to which the Gardners were entitled, as well as the Gardners’ claim for breach of the covenant of good faith and fair dealing.

On the issue of the property description, the court ordered “the property described at 2749 Lake Tahoe Blvd, South Lake Tahoe, CA, further identified as El Dorado County Assessor’s Parcel Number 026-231-13 [was to] be sold pursuant to the option.” The court further directed the parties to the JPA appraisal and stated that the court would “use this appraisal as the basis for future decisions in this case.” In a footnote, the court asserted (erroneously) that “[t]his [was] the appraisal that [defendants] relied upon at the Summary Judgment proceeding.”⁴

On the implied covenant of good faith and fair dealing, the court declined to find a breach. On the issue of damages, the court determined that the Gardners were entitled to recover the rent they paid on the property “since the filing of the summary judgment order in June 2009 . . . until the sale is consummated.”

On December 20, 2010, the court entered a judgment prepared by the Gardners. The judgment provided (among other things) that the purchase price for the property was to be the value determined by the JPA appraisal -- \$470,000. Defendants filed a timely appeal from that judgment, and thereafter the Gardners filed a timely cross-appeal.

⁴ This assertion was erroneous because the court resolved the summary judgment/summary adjudication motions in June 2009, but the JPA appraisal was not done until December 2009.

Meanwhile, following entry of the judgment, the Gardners filed an amended costs memorandum and motion for attorney fees and costs. In their motion, the Gardners sought over \$45,000 in attorney fees for the period from the inception of the case through September 1, 2009, and over \$45,000 in attorney fees for the period from September 2, 2009, through the filing of the fee motion. In their costs memorandum, the Gardners sought \$8,308.23 in costs, including \$575 in filing and motion fees, and \$7,733.23 in “[o]ther” unidentified costs. In the motion, the Gardners explained that these other costs included the \$6,492.50 that was the cost of the JPA appraisal, which they asserted they had obtained at the recommendation of the court following the grant of summary adjudication to “confirm and validate” the value of the Red Hut property.

Defendants filed a motion to tax costs, asserting the Gardners were not entitled to recover the cost of the appraisal, or any unidentified “other” costs, under Code of Civil Procedure section 1033.5. Defendants also opposed the fee motion, arguing (among other things) that the Gardners’ claim for fees for “the second phase of the litigation” (i.e., after the granting of their motion for summary adjudication) should be denied because they did not prevail in that phase.

In February 2011, the trial court granted the fee motion, awarding the Gardners over \$87,000 in attorney fees. Defendants filed a timely appeal from that order. At that time, the court tentatively determined that the cost of the JPA appraisal was “reasonable,” but withheld its actual ruling on the motion to tax costs until the hearing on that motion.

The Gardners subsequently filed an opposition to the motion to tax costs in which they asserted they had \$8,575.23 in recoverable costs (more than identified in the costs memorandum). They argued they were not limited to the costs recoverable under Code of Civil Procedure section 1033.5, but instead could recover all of their costs and expenses because the terms of the lease provided for that.

Neither side appeared at the hearing on the motion to tax costs in March 2011. The court granted the motion in the amount of \$7,733.23, thus taxing all of the “other”

costs the Gardners had sought in their costs memorandum and allowing them to recover only the \$575 in filing and motion fees they had claimed. The Gardners filed a timely appeal from that order.

DISCUSSION

I

Issues On Appeal

In their appeals from the judgment and the order granting attorney fees, defendants assert that the trial court erred in granting the Gardners' motion for summary adjudication, erred in failing to grant defendants' motion for summary adjudication, erred in determining the purchase price under the option and the amount of damages, and erred in awarding attorney fees to the Gardners. In their cross-appeals, the Gardners contend the trial court erred in not awarding them as damages the rent they paid all the way back to when they exercised the option in October 2007 and erred in granting defendants' motion to tax costs.

II

The Grant Of Summary Adjudication To The Gardners And The Denial Of Summary Adjudication To Defendants

A

The Evidentiary Basis Of The Gardners' Motion

Defendants contend the trial court erred in granting the Gardners' summary adjudication motion because the motion "was not based upon any of the evidence they filed in support thereof." More specifically, defendants complain that the Gardners' motion "relied on the 'evidence' submitted by [defendants] in support of their own motion for summary adjudication, the evidence they submitted in opposition to the summary adjudication motion filed by [defendants], and the exhibits attached to [the] Gardners' own verified complaint." According to defendants, the Gardners' motion was

thus “entirely devoid of competent evidence addressing all of the claims in [the] first cause of action of their complaint.”

This argument is frivolous for two reasons. First, defendants did not challenge the sufficiency of the evidentiary basis for the Gardners’ motion in the trial court. Defendants implicitly acknowledge this failure, but contend it is not fatal to their argument on appeal because “[i]n summary judgment proceedings there can be no waiver of the right to object to matter inadmissible by virtue of its incompetency.” In support of this assertion, they cite several cases, the most recent of which dates from 1970. As the Gardners point out, however, these cases are inconsistent with the summary judgment statute in its current form, which provides that “[e]videntiary objections not made at the hearing shall be deemed waived.” (Code Civ. Proc., § 437c, subd. (b)(5).) Defendants ignore this rule entirely, but we cannot. Because they made no evidentiary objections in the trial court, defendants have waived any claim on appeal challenging the evidentiary basis of the Gardners’ motion.

Second, and perhaps even more fundamentally, it is specious for defendants to complain about the evidentiary basis of the Gardners’ motion when that motion relied almost entirely on exhibits to the complaint that were incorporated into allegations in the complaint that defendants admitted in their verified answer were true.

Take, for example, the lease. In paragraph nine of their verified complaint, the Gardners alleged that Willette leased the Red Hut property to the Grants pursuant to a written lease in June 1978, and they further alleged that a copy of that written lease was “attached as Exhibit A and made a part hereof.” In their verified answer to the complaint, defendants specifically “admit[ted] the allegations in paragraph 9” of the complaint. Thus, defendants admitted in their answer that exhibit A to the complaint was the written lease Willette entered into with the Grants in 1978.

“The admission of fact in a pleading is a ‘judicial admission,’ ” which “ ‘has the effect of removing the matter from the issues.” (*Valerio v. Andrew Youngquist*

Construction (2002) 103 Cal.App.4th 1264, 1271.) “The law on this topic is well settled by venerable authority. . . . [A]n admission in the pleadings forbids the consideration of contrary evidence” (*Ibid.*) Thus, because defendants admitted in their answer that exhibit A to the complaint was the written lease Willette entered into with the Grants in 1978, they were forbidden from asserting or offering any evidence to the contrary during the remainder of the action. In light of this fact, it is patently frivolous for defendants to now complain for the first time on appeal that the trial court erred in granting summary adjudication to the Gardners’ because the lease “was [not] attached to any declaration filed with the[ir] motion.”

The same analysis applies to most of the other facts the Gardners asserted were undisputed. That is, the bulk of those facts were supported by references to documents that were incorporated into allegations in the complaint that defendants had admitted in their answer were true. It is truly trifling with the courts for defendants to now argue that summary adjudication was improper because the Gardners failed to attach to their motion evidence on issues that were no longer subject to controversy because the underlying facts were admitted in the pleadings. Certainly, it would have been more appropriate for the Gardners, rather than just referring to documents attached to their complaint, to have supported their separate statement with a request for judicial notice that expressly asked the trial court to take judicial notice of the complaint, the documents attached to and incorporated in it, and the admissions contained in defendants’ answer. Nevertheless, the Gardners’ failure to follow the proper procedure in this regard was not prejudicial to defendants. Defendants admitted the pertinent facts in their answer, and they were bound by those admissions.

For the foregoing reasons, we reject defendants’ argument that the trial court erred in granting the Gardners’ summary adjudication motion because the Gardners failed to file their supporting evidence along with their motion.

B

The Scope Of The Gardners' Motion

Defendants next argue that the trial court erred in granting the Gardners' summary adjudication motion because the ruling on that motion did not entirely dispose of the Gardners' first cause of action for breach of contract. In particular, defendants contend "the sale price, down payment, interest rate, legal description, and damages . . . were not resolved."

Had this argument been preserved for appellate review, we might have found merit in it. The summary judgment statute specifically provides that "[a] motion for summary adjudication shall be granted only if it *completely* disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty." (Code Civ. Proc., § 437c, subd. (f)(1), *italics added.*) At the very least, the granting of the Gardners' summary adjudication motion here left open the issue of damages and thus did not *completely* dispose of the breach of contract cause of action. The Gardners' argument that it was "the [L]egislature's intent to allow a cause of action to be disposed of while the quantification of damages proceed[s] at a later date" is contrary to Code of Civil Procedure section 437c, subdivision (f).⁵

⁵ Subdivision (n)(1) of the statute, on which the Gardners rely for their argument, provides only that following the granting of a motion for summary adjudication, the action "shall proceed as to the cause or causes of action, affirmative defense or defenses, claim for damages, or issue or issues of duty *remaining*." (Code Civ. Proc., § 437c, subd. (n)(1), *italics added.*) In other words, whatever was summarily adjudicated "shall be deemed to be established" (*ibid.*), and the remainder of the case then goes forward. This does not mean, however, as the Gardners suggest, that a claim for damages may be severed from a cause of action, with all the other elements of the cause of action being summarily adjudicated, and the ruling on the damages aspect of the cause of action being "reserved [for] a later date." Proceeding in that manner would plainly contravene the mandate of Code of Civil Procedure section 437c, subdivision (f) that a cause of action must be "completely" disposed of in order to be summarily adjudicated.

Defendants, however, did not preserve this issue for appellate review because they did not make this argument in the trial court in opposing the Gardners' summary adjudication motion. As we have noted, in opposing the motion, defendants merely disputed some of the facts the Gardners asserted and argued on the merits that the Gardners did not have a valid option to purchase the Red Hut property because Willette "had no authority to sell, or grant an option to sell, the . . . [p]roperty." Defendants did *not* argue that the motion was fundamentally flawed because a ruling on it would not completely dispose of the breach of contract cause of action.

Having gambled and lost on attacking the motion on its merits, and having participated willingly and without protest thereafter in the court's resolution of the remaining issues not resolved by the summary adjudication ruling, defendants cannot belatedly assert for the first time on appeal that the motion was improper because a ruling on it would not completely dispose of the cause of action to which it was directed. " '[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court.' " (*Newton v. Clemons* (2003) 110 Cal.App.4th 1, 11.) Defendants offer no reason why we should depart from this fundamental rule in this instance. Accordingly, we reject this challenge to the summary adjudication ruling in favor of the Gardners.

C

The Trial Court's Reliance On Lester's Will

Defendants contend the trial court committed reversible error because in granting the Gardners' summary adjudication motion, the trial court relied on the terms of Lester's will to determine Willette's powers as trustee, rather than relying on the terms of the final judgment of distribution in the probate proceeding in which the will was probated. According to defendants, "the terms of the will were no longer relevant after the Judgment became final."

This argument lacks merit. First, defendants offered no such objection or argument in the trial court when the Gardners relied on the terms of the will to define Willette's powers. Second, and more importantly, defendants acknowledge that "[n]o significant difference appears between the Will and the Judgment of Final Distribution as to the rights of Willette." If there is no significant difference between the will and the judgment of distribution (which is as it should be), then the trial court's reliance on the terms of the will, instead of the terms in the judgment, could not have prejudiced defendants. Indeed, they do not attempt to demonstrate any such prejudice. No prejudice, no reversible error. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573 [referring to "California's constitutional requirement that a judgment not be reversed unless error caused actual prejudice in light of the whole record"].)

D

The Validity Of The Purchase Option

Defendants' primary challenge to the summary adjudication ruling in favor of the Gardners is that the trial court erred in concluding the purchase option was valid. According to defendants, Willette had nothing more than a life estate in the trust assets, and as a life tenant she did not have the legal authority to grant an option to purchase a trust asset that was effective only on her death because such an option was, in effect, a testamentary disposition of the trust property, which, by the terms of Lester's bequest, was to pass to defendants on Willette's death instead.

In response, the Gardners contend Willette was *not* a life tenant; instead, she was a lifetime beneficiary of the trust who, as trustee, had the power to grant an option that was exercisable beyond the term of the trust.

We agree with the Gardners that Willette was *not* a life tenant. Consistent with the terms of Lester's will, the judgment of final distribution of Lester's estate conveyed the Red Hut property to Willette *in trust* "to receive . . . , hold . . . , sell, exchange, mortgage, manage, invest and reinvest the principal and proceeds therefrom" and "to use the

proceeds from the sale of said property and/or the income of said property for her own support and maintenance in whatever sum or sums she may deem necessary and proper for the term of her natural life.” Thus, Willette was both the trustee of the trust and the sole beneficiary of the trust during her lifetime. As such, she was not a life tenant, and she did not hold a life estate. (See *Estate of Smythe* (1955) 132 Cal.App.2d 343, 345 [“A life estate is an estate whose duration is limited to the life of the person holding it or of some other person”]; Rest.3d Trusts, § 5, com. b, pp.49-51 [explaining that trusts and successive legal estates are not the same, although “many trusts bear a close resemblance to relationships between legal life tenants and remainder beneficiaries”].)

Our conclusion that Willette was not a life tenant disposes of defendants’ challenge to the trial court’s determination that the option was valid because their entire argument is premised on their mistaken belief that Willette held only a life tenancy in the Red Hut property. At the beginning of their argument on this point, defendants assert that “Willette . . . did not have the authority to make a testamentary disposition of the trust corpus, *to wit*, a forced sale of the Red Hut property at her death because she was a life tenant.” At the end of their argument, they assert that “[t]he trial court’s expansive conclusion that a life tenant could direct that anything be done with trust property after her death because she was alive when she did so is a strained, unlawful interpretation of well-known law, and reversible error.” As we have concluded, however, *Willette was not a life tenant* -- she was the trustee and beneficiary of a trust that gave her the right to use the trust assets for her support and maintenance during her lifetime.

Under the terms of the trust, Willette could have sold the property outright during her lifetime and lived off the proceeds. Instead, she leased the property during her lifetime and in conjunction with that lease granted the lessees an option to purchase the property upon her death. Defendants have made no effort to show that her action in this regard was beyond her powers as the trustee and beneficiary of the trust. Instead, as we have explained, their entire challenge to the validity of the option is based on the

mistaken premise that Willette lacked the power to do anything with the property that would take effect upon her death because she was a mere life tenant. Because their premise that Willette was a life tenant is without merit, their challenge to the option is necessarily without merit as well.

Because we have rejected all of defendants' arguments challenging the trial court's grant of summary adjudication to the Gardners, we necessarily find no error in that ruling. This conclusion also disposes of defendants' argument that the trial court erred in failing to grant their motion for summary adjudication because that argument rests on a premise we have rejected already -- the premise that, "[a]s a matter of law, [Willette] did not have the right to direct any sale [of the Red Hut property] after her death." Because Willette *did* have such a right in her capacity as trustee, defendants were not entitled to summary adjudication in their favor. Thus, we conclude the trial court correctly denied their motion.

III

Sufficiency Of The Evidence Of The Purchase Price And Damages

Defendants' final challenge to the judgment relates to the trial court's determination of the purchase price under the option (\$470,000) and the amount of damages awarded to the Gardners. According to defendants, "[w]ithout the benefit of live testimony or sworn declarations," "[t]he record below is entirely bereft of any evidence" to support the trial court's determinations on these points.

For their part, the Gardners assert that defendants are judicially estopped from complaining about any lack of evidence relating to the trial court's determination of the purchase price under the option and the amount of damages because defendants twice represented to the court that "th[ere] were no factual disputes." According to the Gardners, they were "fully prepared to go forward with the trial," but at defendants' "urging, the matter was submitted to the trial court for judgment on the pleadings." (Underlining omitted.)

We agree with the Gardners. The doctrine of judicial estoppel applies “when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) Here, as we have noted already, in their pretrial brief defendants asserted that there were “no triable issues remaining to proceed to trial, and therefore the Court should resolve the various questions of law presented in the instant briefing and enter judgment at the conclusion of this pretrial briefing.” We may presume that in deciding the case without hearing from any witnesses, the trial court relied on defendants’ representation that no trial was necessary beyond what the court could determine from the parties’ briefing. It is far too late now for defendants to disavow the position they took in the trial court and insist that the presentation of evidence was necessary for the court to determine the purchase price under the option and the amount of damages to which the Gardners were entitled.

Defendants assert that judicial estoppel “has never been applied to preclude a party from challenging incompetent evidence,” but they offer no authority to support that assertion. In any event, whether the doctrine has been invoked before, under circumstances like those here, is not particularly relevant. What matters is that we can see no reason why the doctrine should not be applied here. Defendants told the trial court that no trial was necessary and the case could be decided on the briefing. The court followed that course, but now that the result did not go defendants’ way, they have changed their mind and want to assert that the presentation of evidence *was* required. This sort of change in position is exactly what the doctrine of judicial estoppel is intended to prevent.

Defendants contend that “[t]o the extent [their] trial attorney waived their right to trial on the \$470,000 sale price or the \$2,597.40 monthly rent breach of contract damages, he was not permitted to do so” because “[t]he eventual judgment . . . was, essentially, a default judgment,” and an attorney cannot agree to entry of a default judgment without authorization. (See *In re Horton* (1991) 54 Cal.3d 82, 94.) We disagree. The judgment the trial court entered was nothing at all like a default judgment, nor can defendants’ trial attorney be deemed to have agreed to entry of a default judgment. Defendants’ trial attorney asserted numerous arguments on their behalf. On the issue of damages, defense counsel argued the Gardners had not suffered any because under the Subdivision Map Act the option could not legally compel the sale of only part of a legal estate.⁶ This argument also covered the issue of the purchase price, inasmuch as defendants were taking the position that the option could not force them to sell only part of a legal parcel at *any* price.

Essentially, defense counsel’s argument on behalf of defendants was that the option was not enforceable because it covered only part of a legal parcel. Counsel’s decision not to force the Gardners to put on evidence of the amount of rent they were paying on the property or to have either or both of the appraisals on the property entered into evidence in the event the court rejected this argument was *not* the legal equivalent of agreeing to a default judgment. Accordingly, defendants’ final challenge to the judgment is without merit.

⁶ Defendants may have elected not to contest the assertion in the Gardners’ pretrial brief that they were paying \$2,597.40 in monthly rent on the Red Hut property because they knew that number was correct.

IV

Amount Of Damages

In their cross-appeal from the judgment, the Gardners contend the trial court erred as a matter of law in its award of damages because they were entitled to recoup the amount they paid in rent on the Red Hut property all the way back to October 2007, when they exercised the option. As we have noted, the trial court decided to award as damages the rent the Gardners had paid only back to the filing of the order on their motion for summary adjudication in June 2009.

In support of their argument, the Gardners rely on *Erich v. Granoff* (1980) 109 Cal.App.3d 920, contending “[t]he case at bar is identical to *Erich*.” In *Erich*, the plaintiffs were the lessees of certain property that they had an option to purchase. (*Id.* at pp. 925-926.) They attempted to exercise the option, but defendant refused to sell the property to them. (*Id.* at p. 925.) The trial court ordered specific performance but refused to award any damages. (*Id.* at p. 924.) On appeal, the appellate court held they were entitled to recover the rent they paid on the property during the period the defendant “did not meet his obligation of performance,” plus interest. (*Id.* at p. 930.)

The applicable legal principle is explained well in *Ellis v. Mihelis* (1963) 60 Cal.2d 206, where our Supreme Court stated as follows: “The following general rules are applicable where damages are awarded incident to a decree of specific performance: A party to a contract for the purchase or exchange of land who is entitled to a decree of specific performance is also ordinarily entitled to a judgment for the rents and profits from the time he was entitled to a conveyance. The compensation awarded as incident to a decree for specific performance is not for breach of contract and is therefore not legal damages. The complainant affirms the contract as being still in force and asks that it be performed. If the court orders it to be performed, the decree should as nearly as possible require performance in accordance with its terms. One of the terms is the date fixed by it for completion, and since that date is past, the court, in order to relate the performance

back to it, gives the complainant credit for any losses occasioned by the delay and permits the defendant to offset such amounts as may be appropriate. The result is more like an accounting between the parties than like an assessment of damages.” (*Id.* at pp. 219-220.)

Here, the Gardners attempted to exercise the option in October 2007, following Willette’s death, but defendants refused to recognize the exercise of the option. It is true that it was not until June 2009 that the trial court made the legal determination that the option was valid, but the date of that ruling is not pertinent to the determination of the amount of money to which the Gardners were entitled to put them, as nearly as possible, in the position they would have been in if defendants had met their obligation of performance.

Defendants contend that *Erich* “is inapposite for many reasons,” but the distinctions they raise are immaterial to the legal issue at hand. For example, they assert that “the option [in *Erich*] involved a residential property.” What possible difference could that make? Defendants make no attempt to explain.

Defendants do raise one pertinent point on the issue of the Gardners’ damages: they point out that under the terms of the option, the Gardners were to pay 25 percent of the purchase price as a down payment and the remainder in installments under a promissory note. Thus, defendants are correct in observing that had they properly recognized the Gardners’ exercise of the option, the Gardners “would [have been] paying [defendants] a monthly mortgage payment instead of rent.”

The Gardners assert that the mortgage payment they would have been making to defendants is not pertinent to the calculation of damages because the sale has not yet been consummated. In their view, their “damages can be offset against any amounts due and owing for the purchase price once [defendants] finally transfer title.” (Bolding omitted.) In other words, they appear to contend the trial court should have awarded them as damages the rent they have paid on the property from November 2007 until the sale is

finally consummated, and at the time of the consummation they will be entitled to offset the total amount of damages against the purchase price. In their view, the mortgage payments they would have been making had they been allowed to purchase the property have no place in the damage calculation.

That is not true, however. In *Ellis*, the Supreme Court stated as follows: “The guiding principle with respect to the calculation of the damages incident to the decree of specific performance, as we have seen, is to relate the performance back to the date set in the contract. Timely performance of the contract would result in the purchaser’s receiving the rents and profits of the land but being denied the use of the purchase money, and a purchaser who seeks to recover rents and profits must permit an offset for his use of the purchase funds during the period that performance was delayed. In an early case this court held that a defendant in a situation like the one before us should be permitted to offset against the profits interest on the entire purchase price. [Citation.] This holding is the overwhelming weight of authority. . . . [¶] . . . [¶] An exception to the rule permitting an offset of interest against profits is made insofar as the purchaser has, with notice to the seller, set aside money toward the purchase price in such a manner as to realize no use or benefit therefrom. [Citations.] In this situation there is, of course, no danger that the purchaser will be able to obtain both the profits and the use of the purchase money.” (*Ellis v. Mihelis, supra*, 60 Cal.2d at pp. 220-221.)

Here, timely performance of the option would have relieved the Gardners from paying defendants rent for use of the Red Hut property, but at the same time they would not have had the use of 25 percent of the purchase price, nor the use of the monthly mortgage payments thereafter. Under *Ellis*, because the Gardners are seeking to recover the rent they paid after they exercised the option, they must permit an offset for their use of the money they otherwise would have paid to defendants under the option during the period that performance was delayed, *unless* the Gardners, with notice to defendants, set

aside money toward the purchase price in such a manner as to realize no use or benefit therefrom.

It follows from the foregoing that while the Gardners are entitled to recover the rent they paid all the way back to November 2007, the month following their attempt to exercise the option, defendants may be entitled to an offset under *Ellis*. Accordingly, we will reverse the damage award and remand the case to the trial court to recalculate the amount of damages to which the Gardners are entitled in accordance with *Ellis*.

V

Attorney Fees

On their appeal from the award of attorney fees to the Gardners, defendants contend the award was unreasonable because “all proceedings were only as to the second cause of action, one in which [defendants] prevailed.” This argument makes no sense. The proceedings all the way through judgment were clearly not related only to the Gardners’ ultimately unsuccessful cause of action for breach of the covenant of good faith and fair dealing. Instead, they also related to the Gardners’ request for specific performance and accompanying request for damages under a standard breach of contract theory.

To the extent defendants argue that the Gardners “should not have been awarded any attorney’s fees encompassing their unsuccessful claim” and “their attorney’s fees claims should have been offset by their lack of success,” defendants fail to make any attempt to show what *portion* of the attorney fees awarded, if any, can reasonably be attributed only to the Gardners’ unsuccessful cause of action for breach of the covenant of good faith and fair dealing. The trial court itself noted that “while the [Gardners] did not prevail on all matters, the ensuing legal work appears to be reasonable and necessary.” Defendants have failed to carry their burden on appeal to show that the court abused its discretion in making that determination. Accordingly, we will affirm the order granting the Gardners’ motion for attorney fees.

VI

Cost Of The JPA Appraisal

The Gardners contend the trial court erred in refusing to allow them to recover the cost of the JPA appraisal because the lease provided that in any litigation to enforce any provision in the lease, the successful party would recover “all costs and expenses,” without limiting the recoverable costs to those allowed under Code of Civil Procedure section 1033.5.⁷ Defendants contend there was no error because, “since the [lease and the option] are not valid, [defendants] are not liable for any non-statutory costs” that might otherwise be recoverable under the terms of those agreements. Defendants also contend they are not subject to those agreements because they did not sign them.

Subdivision (a) of Code of Civil Procedure section 1033.5 identifies certain costs that are recoverable as a matter of right, as long as they are “reasonably necessary to the conduct of the litigation.” (Code Civ. Proc., § 1033.5, subd. (c)(2).) Subdivision (b) of the statute identifies other costs that are *not* recoverable “except when expressly authorized by law.” Subdivision (c)(4) of the statute provides that “[i]tems not mentioned in this section and items assessed upon application may be allowed or denied in the court’s discretion.”

The parties to a contract -- like the lease and option here -- can “choos[e] a broader standard authorizing recovery of reasonable litigation charges and expenses” beyond those covered by section 1033.5 of the Code of Civil Procedure. (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 492.) But such costs “must be specially pleaded and proven at trial, and not awarded posttrial.” (*Hsu v. Semiconductor Systems, Inc.* (2005) 126 Cal.App.4th 1330, 1341.) “[T]he proper interpretation of a contractual agreement for shifting litigation costs is a question of fact

⁷ The Gardners do not challenge the trial court’s taxing of the \$1,240.73 in “other” costs they claimed in their costs memorandum beyond the cost of the JPA appraisal.

that “turns upon the intentions of the contracting parties.” ’ [Citation.] Accordingly, ‘the issue must be submitted to the trier of fact for resolution pursuant to a prejudgment evidentiary proceeding, not a summary postjudgment motion.’ ” (*Id.* at pp. 1341-1342.)

Here, the Gardners expressly rely on *Arntz Contracting* to support their claimed “right to recover [the cost of the appraisal as a] reasonable litigation charge[] and expense[] beyond statutory costs.” Under *Hsu*, however -- and for that matter, *Arntz Contracting* -- the Gardners had to plead and prove their right to recover the cost of the JPA appraisal under the terms of the lease and/or the option and could not simply claim that cost in a costs memorandum, as they tried to do.⁸ Accordingly, the trial court did not err in taxing this item of the Gardners’ claimed costs, and therefore we will affirm the trial court’s order granting defendants’ motion to tax.

VII

Attorney Fees And Costs On Appeal

The Gardners contend they are entitled to recover the attorney fees and costs they have incurred in connection with this appeal, and they ask us to award them their fees and costs or at least determine their entitlement to such an award and remand the matter to the trial court to determine the reasonable amount of fees and costs they should recover.

On defendants’ appeal from the judgment and their cross-appeal from the judgment, the Gardners have substantially prevailed, and thus they will be entitled to recover their costs relating to those appeals.⁹ They will likewise be entitled to recover

⁸ In *Arntz Contracting*, “litigation expenses were pleaded and proven pursuant to a procedure stipulated by the parties.” (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.*, *supra*, 47 Cal.App.4th at p. 492.)

⁹ The only aspect of those appeals on which the Gardners did not prevail is the issue of whether the mortgage payments they would have been making are relevant to the calculation of damages. We have agreed with defendants that under *Ellis*, those payments are relevant and must be taken into account by the trial court in making a

their costs relating to defendants' appeal from the attorney fees award, which we affirm. The Gardners are *not* the prevailing parties, however, on their appeal from the order taxing their costs, because we have rejected their challenge to that order. Accordingly, the Gardners will be entitled to recover all of their appellate costs except those attributable to the appeal from the order taxing their costs; instead, defendants will be entitled to recover any of their appellate costs attributable to the appeal from that order, as they prevailed on that appeal.

As for the Gardners' request for an award of attorney fees on appeal, we will leave that issue -- both entitlement and amount -- to the trial court on remand. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 980(3), p. 1027; Cal. Rules of Court, rule 3.1702(c).)

DISPOSITION

The award of damages is reversed, and the case is remanded to the trial court to recalculate the amount of the award in accordance with this opinion. Otherwise, the judgment is affirmed. The postjudgment order granting the Gardners' motion for attorney fees and the postjudgment order granting defendants' motion to tax costs are affirmed.

proper damage award. The likely benefit of that ruling to defendants, however, is small compared to the additional damages the Gardners have shown they are entitled to, not to mention the value of the Gardners' victory in upholding the grant of summary adjudication in their favor and the denial of summary adjudication to defendants. Accordingly, on balance, the Gardners are the prevailing parties on the appeals from the judgment.

The Gardners shall recover their costs on appeal, except for those attributable to their appeal from the order granting defendants' motion to tax costs; defendants shall recover their costs on appeal attributable to that appeal but no other. (Cal. Rules of Court, rule 8.278(a)(3).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.